No. 87 - 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR and
McKINLEY and WILMA THURMAN - - Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY and
SOUTH CENTRAL BELL TELEPHONE COMPANY - - - - - - - Respondents

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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(See inside cover for certification)

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CERTIFICATE OF SERVICE

It is hereby certified pursuant to Supreme Court Rule 28 that three copies hereof were mailed, first class mail, postage prepaid, this 26 day of June, 1987, to Mr. David Armstrong, Office of Attorney General, Capitol Building, Frankfort, Kentucky 40601, and to the following counsel of record: Mr. Marvin J. Hirn, 3300 First National Tower, Louisville, Kentucky 40202, Counsel for Times Mirror; Mr. John Bilby, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202, Counsel for LG&E; Mr. Laurence J. Zielke, Mr. Michael Lowe, 450 S. Third Street, Louisville, KY 40202, Counsel for Storer; Mr. James Harralson, South Central Bell, P. O. Box 32410, Louisville, KY 40202, Counsel for Bell.

NICHOLAS W. CARLIN
Counsel for Petitioners

QUESTIONS PRESENTED

I. Did the Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the Statute of Limitations?

II. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?

III. Is CATV a utility?

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IN THE

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October Term, 1987

FREDRIC E. MICHELS, Et Al. - - *Petitioners*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., Et Al. - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky rendered on January 22, 1987.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was decided and filed on January 22, 1987 (Appendix A), which the Supreme Court of Kentucky determined "should not be published". A petition for rehearing, and/or modification and extension of opinion was filed. The order of the Supreme Court of Kentucky denying that petition was entered on April 30, 1987 (Appendix B).

JURISDICTION

The opinion of the Supreme Court of Kentucky (Appendix A) was decided and filed on January 22, 1987; and a timely petition for rehearing, and/or modification and extension of opinion was denied by order

of the Supreme Court of Kentucky (Appendix B) on April 30, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2101 (c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

The United States Constitution, Article I, Section 10 (1) states: "No state shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts . . ."

The Fifth Amendment to the United States Constitution provides: ". . . nor shall private property be taken for public use, without just compensation."

Statutory Provisions

47 U.S.C. 541 (a) (2) states "any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure —

> c. that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator."

47 U.S.C. 541 (3) (c) states "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

Kentucky Revised Statute 278.040 (2), states: "The jurisdiction of the Commission shall extend to all utilities in this state. The Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities . . ."

STATEMENT OF THE CASE

The petitioners seek damages against an electric company, a telephone company and two cable television companies for trespass to land by the location of overhead CATV distribution cable and a CATV guy wire on the property of Petitioners in public utility easements without their permission, or payment of just compensation, for this taking of interests in land. The parties filed cross-motions for summary judgment and scheduled briefs thereon in the trial court. The main issue of Petitioners was that their easements were interests in land not apportionable to new uses or new users such as CATV. The Respondents' defenses were that the easements were apportionable and that Petitioners had consented to use of their easements by later subscription to CATV services. Petitioners' reply briefs in the trial court strongly argued that CATV and utility Respondents were guilty of fraudulent concealment of their duty to disclose to landowners the question of trespass and landowner permission for use—thus negating consent.

The Court of Appeals of Kentucky declined to comment on the lower court's opinion and ruled that the electric and telephone easements were apportion-

able to CATV use without compensation. That Court further found that CATV was a utility, contrary to a determination of the Public Service Commission of Kentucky that it was not.

The Supreme Court of Kentucky then declined to comment on the opinion of the Kentucky Court of Appeals and by a four vote majority found for Respondents on the basis of implied consent of the landowners to the use of their land by CATV. One Justice concurred in result only and stated that he would not find implied consent, but would find the easements apportionable and would find CATV to be a utility. Another Justice held for the Petitioners on the basis that fraudulent concealment was present vitiating implied consent. He stated he would find for Petitioners, implying that utility easements are not apportionable.

On Movants' Petition for Rehearing and/or Modification and Extension of Opinion, they argued to the Supreme Court of Kentucky the issue of fraudulent concealment and cited *Edelman* v. *Jordan,* 415 U. S. 651, 94 S. Ct. 1346, 39 L. Ed. 2d 662, *Lloyd Corp., Ltd.* v. *Tanner,* 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), *Brady* v. *U. S.,* 397 U. S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463, *In Re Bryan,* 645 F. 2d 331 (1981), *U. S.* v. *Fong,* 529 F. 2d 55 (1975), and *Rivera* v. *Marcus,* 696 F. 2d 1016 (1982), to show that it was a violation of their Fifth Amendment Constitutional rights for that Court to find implied consent by them.

This suit is a potential class action, which, pursuant to a house to house survey, directed by counsel,

Nicholas W. Carlin, in Jefferson County, Kentucky, directly affects 31,000 single family dwelling owners by trespass, half of whom do not subscribe to cable t.v. This number excludes approximately 181,000 dwellings where the CATV cable locations are in road rights-of-way and other public areas not involved in easements over private land. The decision of the Supreme Court of Kentucky basing its decision on consent, fails to resolve the rights of the owners who do not subscribe to cable television services.

CATV cable is thick, located low on the pole, is unsightly, and causes damages. The holdings of *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 102 S. Ct. 3164, 458 U. S. 419, 73 L. Ed. 2d 868, and *Consolidated Cable Utilities, Inc.* v. *City of Aurora* (Ill.) 439 N. E. 2d 1272 (1982) prohibit this taking of interests in land.

CATV distribution cable, whether overhead or underground, requires a continuous connection over a mileage of realty plots, without a break in the cable linkage. It passes over an owners' property in a public utility easement and on to other property whether or not that individual owner subscribes to CATV services. Distribution cable is distinguished from the "drop line" which is the smaller line which connects the distribution cable to an individual home to provide CATV service.

These easements, at earlier dates, were obtained by consent, negotiated payment, or condemnation for public utility purposes. An easement document, like a contract, contains rights and responsibilities which

flow from the utility to the landowner, and vise versa. Few easement documents authorize the utility owner to apportion these easements to new uses and new users. Some easements are obtained from real estate developers through local government planning and zoning commissions, and are reflected on subdivision plats which affect many dozens of homes at the same time. That is the case of the easements involving petitioners. Their easement language is minimal and is found on a legend on the subdivision plat. There is no language granting the utility power to apportion easements.

The two CATV Respondents had local government franchises to provide CATV service in this community, but these franchises are subordinate to Petitioners' constitutional rights to protect their realty interests. The decision of the Supreme Court of Kentucky results in a taking of interests in private land without compensation, in violation of the United States Constitution, Fifth Amendment, and impairs the obligations of contract, to wit, easement agreements, under the United States Constitution, Article I, Section 10 (1).

The issue of whether utility easements are apportionable to new uses and new users such as CATV, without compensation to landowners, is of great importance to Kentuckians and landowners throughout the United States. The Court of Appeals of Kentucky stated that this issue was of "unusual significance". This Court has indicated a healthy respect for landowner rights in *Loretto* v. *Teleprompter, supra* and in

the June, 1987 decision concerning the Lutherglen Campground.

This Court granted certiorari in *City of Los Angeles* v. *Preferred Communications, Inc.*, (Cal) 106 S. Ct. 2034, 90 L. Ed. 2d 480, and over objections of all counsel, granted counsel for the present Petitioners, Nicholas W. Carlin, permission to file a brief Amicus Curiae, which brief was filed. That Amicus brief generally raises serious issues concerning landowner property rights and trespass. The issues raised in that amicu brief and this Petition are not resolved. This court remanded *City of Los Angeles* v. *Preferred Communications, Inc.* to the U. S. District Court in Califarnia to develop guidelines to balance the regulatory interests of municipalities against the First Amendment rights of cable television operators.

REASONS FOR GRANTING THE WRIT

I. The Petitioners Did Not Consent to the Placement of CATV Distribution Cable on Their Land When They Timely Objected to Trespass Within the Statute of Limitations.

The Petitioners were not aware of their rights against trespass until they raised those rights, and when they raised those rights, they did so well within the Statute of Limitations for trespass to land under Kentucky law. Further, they were mislead as to their rights, due to fraudulent concealment by the CATV defendants, see dissenting opinion of Justice Wintersheimer in the opinion of January 22, 1987, by the Supreme Court of Kentucky (Appendix A, pps. 8a-11a).

The City of Louisville and Jefferson Fiscal Court and by and large, the governments of municipalities and landowners in other states have been kept in the dark about their rights to permit or deny CATV takings of interests in land. Only now are these issues beginning to appear in appeal court opinions in states such as Illinois and California.

U. S. Supreme Court decisions hold that implied consent to waive a constitutional right cannot be lightly implied. In *Edelman* v. *Jordan, supra,* Justice Rehnquist wrote the court's opinion that constructive consent is not a doctrine commonly considered with the surrendering of constitutional rights. He stated that since the Court was dealing with a constitutional question, it was less constrained by the principal of stare decisis than it would be in other areas of the law. That case involved the arguable consent to sue by a state for violating federal regulations on administration of a federal aid program to the aged within individual states.

In *Lloyd Corp., Ltd.* v. *Tanner, supra,* Justice Powell in the majority opinion held that Fifth and Fourteenth Amendment rights of private property owners as well as First Amendment rights of all citizens must be respected and protected. That case involved the conflict of First Amendment free speech rights of a pamphleteer on private shopping center property. The opinion stated that there had been no such dedication of the owner's private shopping center to public use as to entitle Respondent to exercise his First Amendment rights, and found trespass. Justice

Powell stated that property does not lose its private character merely because the public is generally invited to use it for designated purposes. By analogy, Movants' property has a private character which has not been lost just because easements on it are dedicated to electric and telephone purposes.

In *Brady* v. *U. S., supra,* Justice White stated the majority opinion that waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. The facts of this case as developed in 36 depositions and 7,000 pages of transcript clearly show Movants' denial of such knowledge and a demonstration of many acts of non-disclosure and concealment by Respondents and some positive acts of mis-direction such as misquotation of law on the Storer doorhangers and the acts of Times Mirror in paying forms of compensation for permission and silence from objecting homeowners.

In *In Re Bryan, supra,* the Court held that "purported waivers of fundamental constitutional guarantees are subject to the most stringent scrutiny." The Court stated, "because of far-reaching consequences involved in waiver of basic rights, courts indulge every reasonable presumption against waiver . . ." That Court cited *Brady, supra,* in support.

In *U. S.* v. *Fong, supra,* the Court put all constitutional rights on the same level of importance in making legal and factual determinations about waiver. The Court stated that "whether a defendant understood his rights and whether he knowingly and voluntarily

waived them, is in the first instance a question of fact to be determined from all circumstances. The test for determining competent and intelligent waiver is the same regardless of which constitutional right is being waived." Petitioners contend that they have the right to protect their property under the Fifth Amendment of the United States Constitution. They contend that not all facts of fraudulent misrepresentation were considered by the court against the CATV Respondents and some facts were misconstrued. The license agreements among the Respondents were non-public. The license agreement between Bell and Storer shows in paragraph 2 that Storer was responsible for getting and necessary permission for attachments from landowners. Paragraph 16 makes it clear that the agreement does not grant an easement to Storer.

The opinion of the Supreme Court of Kentucky seems to give weight to the fact that Movants signed agreements for the attachment of drop line connections for subscription to CATV. Those agreements do not in any way discuss or seek consent or permission of subscribers to the prior installation of distribution equipment including distribution cable on their land. What they do permit is the attachment of a drop line to the distribution cable and the further connections required to provide CATV service. The acceptance of CATV service by a user does not imply acquiescence to trespass.

In *Rivera* v. *Marcus, supra,* the Court held that "half sister, who had liberty interest in preserving familial relationship with her half brother and sister,

did not waive any of her constitutional rights by entering into foster care agreement with state welfare department, even though agreement authorized state to remove children from foster home at any time, where there was no evidence that half sister intentionally and intelligently waived her due process rights when she signed the agreement or that state informed her of legal implications of her decision." In this case, the Movants did not waive their Fifth Amendment constitutional rights by signing the agreements pertaining to CATV services.

The majority opinion appears to find that *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964), is conclusive against Petitioners on the issue of consent. It is requested that this Court reconsider that holding in relation to *Satin* v. *Hialeah Race Course, Inc.,* Fla., 65 So. 2d 475 (1953). Petitioners contend that *Satin, supra,* applies to the facts of this case and *Bradford, supra,* does not. *Satin,* held that "a conditional or restrictive consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with, and that consent is restricted to provisions affecting its exercise." The Court found that rules of the race course provided that press pass would not be used by non-press members, that a party gained entrance by mis-representing that she was a press member, and that she was, therefore, only a licensee, if not a trespasser. The press pass was used in an unauthorized way much as Movants contend their easements were used improperly by LG&E and Bell as well as, by the CATV Respondents.

II. Electric and Telephone Easements Are Not Unilaterally Apportionable to New Uses and New Users Such as CATV.

Easements should be interpreted by the words stated, and the intentions of the parties to those easements. *Thomas* v. *Ross,* R.I., 376 A. 2d holds at pp. 1370-71, that where language reserving an easement is not reasonably susceptible to more than one interpretation, and there is no showing that it should be read in any but its ordinary sense, then the language will be read in that ordinary sense. It states that a Court should seek only the intention expressed and not undetermined intentions. *Lindhorst* v. *Wright,* Okla., 616 P. 2d at 453 (1-3) interprets an easement in the same manner as a written contract—since no ambiguity exists in the language used, intention is determined from the words used. It also states that the express language of a contract controls the extent and scope of an easement.

A franchise is subordinate to private rights. In *City of St. Louis* v. *Western Union Telegraph,* 37 L. Ed. 38, 13 S. Ct. 485, 148 U. S. 92, a telegraph company attempted to use existing utility poles without payment, relying on a post-road act. *St. Louis* holds at 37 L. Ed. 386 that a franchise does not carry with it the unrestricted rights to appropriate the public property and states that like any other franchise it must be exercised in subordination to public *as to private rights* (emphasis added). It states at 384, "no one would suppose that a franchise from the federal government to a corporation . . . to construct . . . lines of . . . com-

munication, would authcrize it to enter upon private property of an individual and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation . . ." This case supports Petitioner's stance that a "taking" is occurring and that a franchise cannot validate that taking.

Loretto v. *Teleprompter Manhattan CATV Corp., supra,* holds that CATV attachments, though small in size and aggravation, are an unconstitutional taking of a realty owner's interest in land without compensation. The case rejects the concept of public interest in CATV, strongly supports the landowner's rights against such intrusion, and finds that the intrusion causes damages. *Loretto, supra,* at 73 L. Ed. 2d 81 considers easements by stating, ". . . and even if the government physically invades only an easement in property, it must nonetheless pay compensation . . ." citing *Kaiser Aetna* v. *United States,* 444 U. S. at p. 181.

Landowners in several states have sought injunction to stop the location of CATV cable on their property. Courts have held for CATV in most of these cases, citing the public interest in CATV and in some cases finding the underlying easements to be apportionable. Such cases are *Hoffman* v. *Capitol Cable Television System, Inc.,* 386 N.Y.S. 2d 385, *Jolliff* v. *Hardin Cable Television Co.,* 269 N. E. 2d 588 and *Croley* v. *New York Telephone Co.* and *Cablevision, Inc.,* 363 N.Y.S. 2d 292. In those cases, the underlying ease-

ments contained words of assignability and leaseability. *Hoffman* found for the CATV defendant on the basis of the public interest in CATV, but also recognized that harm may have been done to private realty by the placement of CATV cable. In the same time period, prior to the United States Supreme Court holding of *Loretto* v. *Teleprompter Manhattan CATV Corp., supra,* the New York Court also found for Teleprompter in *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 440 N.Y.S. 2d 843, on the basis of public interest in CATV. *Croley* also found for CATV, but that was because the cable company was incorporated as a public utility, and the specific easement language was broad and provided the company a right to permit attachment of communication . . . wires and facilities of *other public utility companies* (emphasis added) and to convey to such other companies interests and rights granted under the easements.

Factually close to the *Croley* easement language is the *Jolliff* easement where the Plaintiff clearly contracted for expanded uses like CATV in the terms of his easement. The easement language specifically provides for assignees, lessees, and tenants of both the electric and telephone company.

Petitioners agree that the *Croley* and *Jolliff* easements are apportionable because the plaintiffs contracted to allow the type of activity that occurred by agreeing to the easement language. However, that easement language is not typical.

None of these New York decisions or other state court decisions gushing over the public interest in

CATV reflect the present law. The United States Supreme Court in *Loretto, supra,* changed the stare decisis of these holdings and made it extremely clear that the "public interest" in cable television, is not a match for the private rights of landowners even when the damages are small.

III. CATV Is Not a Utility.

The Public Service Commission, pursuant to K.R.S. 278.040(2) has exclusive jurisdiction over the regulation of rates and services of utilities. Rulings of the Public Service Commission clearly show that CATV is not a utility. Several years ago, CATV operators initiated hearings before the PSC seeking to be declared utilities. However, they were declared by the PSC to not be utilities—just customers.

47 U.S.C. 541(c) states, "any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

To have the status of a public utility, the activity performed should be an essential public service. *Devon-Aire Villas Homeowners Association, No. 4, Inc.* v. *Americable Associates,* Fla., 34 Dist. Ct. App. No. 84-675 (1985), held that CATV is not a public utility and that its entry upon platted public utility easements to install underground CATV cable is a trespass. In *Americable* the Court stated,

> "... we do not believe that the value and necessity of cable television is so self-evident that this court should arrogantly declare this newest rage of the media world to be the equivalent of, for example,

> electricity and water. As the Court in *Teleprompter* v. *Hawkins* observed in a different context, if cable television is so vested with a public interest as to justify public regulation and control, that is a matter for determination by the state legislature, 384 So. 2d at 650. Similarly it seems to us that if cable television is so vested with the public interest as to give it the right to use easements on private lands dedicated for public utility use only, the legislature, rather than this court, should say so . . ."

Americable states: "That 'public utility' eludes precise definition; and that examination of statutes and case law persuades that a public utility is a creature of statute impressed with a public use, which provides services generally considered essential, and enjoys certain power usually reserved to the sovereign; and concludes that cable television is not a public utility."

Public utilities in Kentucky offer essential and necessary services such as electricity, telephones, gas transmission, and water. Cable television is not essential and does not have the attributes of necessity and importance. Typically, a public utility is rate regulated and otherwise regulated to conform to the public good. This is not so in the case of CATV. Typically, a utility has the power of condemnation. CATV does not.

City of Owensboro v. *McCormick,* Ky., 581 S. W. 2d 3 (1979), holds that governmental compulsion to surrender property must always be accompanied by payment of just compensation. It states that governmental power compelling a citizen to surrender property to

another citizen who will use it predominantly for his own private benefit, just because such alternative private use is thought to be preferable in the subjective notion of governmental authority, is repugnant to constitutional protections whether they be cast in a fundamental fairness component of due process or in the prohibition against exercise of arbitrary power.

Contained in 47 U.S.C. 541 is the statute "that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator." This recognizes that damages occur to owners of property from cable installation. This clause was added to accommodate the mandates of *Loretto* v. *Teleprompter Manhattan CATV Corp., supra* see House of Representatives Report 98-934, pages 80-81, (Appendix D).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certirorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, MCKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The residential property of each of the movants is encumbered by dedication on the subdivision plats or by deeds of dedication with easements for public utility purposes or for electric and telephone service. The respondents, Louisville Gas and Electric Company and South Central Bell Telephone Company have used these easements for the

purpose of installing and maintaining electric and telephone service to customers. These utility companies have permitted the respondents, Times Mirror Cable Television of Louisville, Inc. and Storer Communications of Jefferson County, Inc. to install and maintain an aerial coaxial television cable upon utility poles within the confines of the easements.

There is presently extending across the real property owned by each of the movants upon utility poles within the confines of the easements an aerial coaxial television cable. Each of the movants subscribed to the television cable service, signed an agreement with the cable companies granting their employees access to the property to install and service cable equipment, allowed the cable to remain in place without objection for a substantial period of time, and permitted the installation of a drop line across their property to connect their residences to the coaxial cable.

Each of the movants contend that the easement upon their property was granted for electric and telephone service or for public utility purposes and that the coaxial television cable does not qualify as a beneficiary under the terms of the easement. They contend, therefore, that the television cable constitutes a continuing trespass upon their private property for which they are entitled to damages.

Summary judgment was granted by the trial court to each of the respondents on the ground that the issue was moot as to the movants Michels, and that there was no trespass with respect to the other movants because they impliedly consented to the installation and maintenance of the cable.

The Court of Appeals affirmed the judgment of the trial court, but for a different reason than that given by the trial court, and expressed no opinion on the rationale for the judgment given by the trial court. The Court of Appeals

held that the particular easements in question were susceptible to apportionment to television cable usage, although the instruments creating the easement contained no express language permitting use by television cables.

This court likewise affirms the judgment. We decline, however, to review the question of the apportionability of the easements involved in this case.

A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. *Restatement of the Law,* Torts 2d, § 329.

Habitual or customary use of property for a particular purpose, without objection from the owner or occupant, may give rise to an implication of consent to such use to the extent that the users have the status of licensees, where such habitual use has existed to the knowledge of the owner and has been accepted or acquiesced in by him. *Bradford* v. *Clifton,* Ky., 379 S. W. 2d 249 (1964).

Consent may be manifested by silence or inaction, and even when there is in fact no consent, the words or actions or inactions of an owner or occupant may, under some circumstances, manifest an apparent consent such as will justify reliance on the apparent consent. *Restatement of the Law,* Torts, 2d, § 892, Comments (a) and (c).

We think it is clear that the movants had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

There are circumstances in which consent becomes irrevocable. *Restatement (Second) Torts,* § 892A(5) (1979). We hold that the general principles of estoppel apply here and that movants are now estopped to contest respondent's use of the easement.

Because the issues in this case can be decided on the consent of the movants, it is unnecessary to discuss the broader question of the apportionability of the easement to cable television usage.

We find no error in the other matters asserted by movants.

The judgment is affirmed.

Stephens, C.J.; Gant; Stephenson; and Lambert, J.J. concur.

Leibson, J., concurs by separate attached opinion. Wintersheimer, J., dissents by separate attached opinion. Vance, J., not sitting.

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RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, McKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

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On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

CONCURRING OPINION BY JUSTICE LEIBSON

I concur in results only.

If there were a continuing trespass, I would have some difficulty with the concept of estoppel.

However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easements in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040.

In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easements in question.

RENDERED: JANUARY 22, 1987
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, McKINLEY THURMAN, and WILMA THURMAN - - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - - *Appellees*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent.

It is my view that informed consent is a necessary element of the doctrine of equitable estoppel. In my opinion, a person will not be estopped by his acts unless he understands his rights or actively participates or silently acquiesces in conditions operating to deprive him of his rights. Consent, when given, must be with full knowledge of the facts and rights affected. *See Trimble* v. *King,* 131 Ky. 1, 114 S. W. 317 (1908).

Waiver exists only where a party with full knowledge of the material facts does or forbears to do something inconsistent with that right and indicates that knowledge of the existence of the right is a prerequisite to such relinquishment. No one can waive a right which he does not know. *Harris Bros. Construction Co.* v. *Crider,* Ky. 497 S. W. 2d 731 (1973).

The party asserting estoppel must be excusably ignorant of the true facts and change his position to his detriment in reliance on the words or conduct of the other party. *See City of Georgetown* v. *Mulberry,* Ky. 485 S. W. 2d 503 (1972). That case indicates that where there is a duty to speak or act, silence and inaction are factors to be considered. The cable companies had a duty to seek permission from the property owners and their predecessors. It is not clear that any reason exists for them to ignore that duty.

Estoppel was developed to protect rights and not to reward wrongdoers, even if the wrongdoers are innocent of evil intent. *Sueskind* v. *Michael Hardware,* 228 Ky. 780, 15 S. W. 2d 529 (1929). The cable companies had superior knowledge of their legal obligations and duties to obtain permission for use of the easements. They had a duty to disclose to the property owners, and they knew it, as demonstrated in the license agreements between LG&E and Bell Telephone. It would appear that they willfully failed to disclose or seek permission or easement rights from the property owners.

It appears that both cable companies did not change their positions or any of their operating procedures throughout the Louisville and Jefferson county area. Objection by other owners never caused the companies to clarify their legal responsibilities to anyone. It seems unlikely that objections by these landowners would have

changed the companies' policies and approach to installation.

In addition in this case, the Public Service Commission, along with LG&E and Bell Telephone, allowed the cable companies to enter licensing agreements with the utility companies for the use of their poles only with the requirement that the cable companies would obtain any permission or easements necessary from landowners. The cable companies entered on the property knowing that they had acquired a right to use the utility poles only and did not have the authority without permission to use the easement. They should not be able to now claim protection by virtue of estoppel.

The argument that because the property owner subscribes to cable TV he has no right to object to the trespass by the cable companies is without merit. Most property owners desire electricity more than they desire cable, but it is widely recognized that electric utilities must obtain either easement rights by condemnation or permission from the property owners involved. In that instance there is permission granted and if agreed, a payment for the easement right by the electric company to the landowner and continuing monthly payments by the landowner to the utility for electric services. This is an orderly, proper and commonly understood practice. The same should apply here. The landowner was not consulted by either the telephone utility or the cable company about his right to refuse to permit a cable guywire on his property. The license agreement required the cable company to obtain an appropriate easement but that licensed document was not published. Consequently the telephone utility had superior knowledge and a duty to disclose this information to the property owners. This duty arose from its easement.

The guywire on the property was visible, but the legal obligations and weaknesses of the cable company were

not. The failure of the telephone company to disclose to the public, including the property owners, his right to refuse or to permit the guywire and any other cable distribution equipment could be considered to be fraudulent concealment and if that is the case, it negates the defenses of consent, estoppel and waiver.

Reliance on *Bradford* v. *Clifton,* Ky. 379 S. W. 2d 249 (1964) is misplaced. The facts in *Bradford, supra,* are not comparable and the case does not hold that one who has consent for a prior use has consent for new uses. It says only that habitual or customary use of property for a particular purpose without objection from the owner or occupant may give rise to an implication of consent to such use. That does not extend to new uses and new users.

Summary judgment as granted by the trial court is not appropriate in this situation. I would reverse both the Court of Appeals and the trial court.

APPENDIX B

SUPREME COURT OF KENTUCKY

86-SC-123-DG

FREDRIC E. MICHELS, ADRIAN MICHELS, ROBERT KLEIN, TERESA KLEIN, RICHARD RECEVEUR, PAMELA RECEVEUR, MCKINLEY THURMAN, and WILMA THURMAN - - - *Movants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - *Respondents*

On Review from Court of Appeals
No. 85-CA-1081-MR
(Jefferson Circuit Court No. 83-CI-07641)

ORDER DENYING PETITION FOR REHEARING, AND/OR MODIFICATION AND EXTENSION OF OPINION

Movant's Petition for Rehearing, and/or Modification and Extension of Opinion is denied.

All concur. Vance, J., not sitting.

ENTERED: April 30, 1987.

(s) Robert F. Stephens
Chief Justice

APPENDIX C

OPINION RENDERED: JANUARY 31, 1986; 3:00 P.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 85-CA-1081-MR

FREDRIC E. MICHELS, ADRIAN MICHELS; ROBERT AND TERESA KLEIN; RICHARD AND PAMELA RECEVEUR; and MCKINLEY AND WILMA THURMAN - - - - *Appellants*

v.

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC.; STORER COMMUNICATIONS OF JEFFERSON COUNTY, INC.; LOUISVILLE GAS & ELECTRIC COMPANY; and SOUTH CENTRAL BELL TELEPHONE COMPANY - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Olga Peers, Judge
Action No. 83-CI-07641

AFFIRMING

* * * * * * *

BEFORE: HOWARD, LESTER and MILLER, Judges.

MILLER, JUDGE. Appellants are residence owners in Jefferson County, Kentucky. Appellees are two cable television companies and two utility companies. The question arises whether cablevision companies, relatively new enterprises, may string their coaxial cables along and across lands by way of traditional utility easements. The use is made with the consent of the other users of the easement—

Louisville Gas and Electric Company and South Central Bell Telephone Company. The question is of considerable significance as many of the utility easements predate the advent of community antenna television (CATV). It is therefore arguable the use of the easement in furtherance of the CATV enterprise, a function not contemplated when the easement was established, is impermissible and consequently a trespass against the owner of the servient estate.

The easements in question, appearing in subdivision plats and deeds of dedication, are as follow:

> The Michels easement reads, "The spaces outlined by dotted lines and marked electric and telephone easements or street lighting easements are hereby reserved for easements for electric and telephone utility purposes. . . ."
>
> The Receveur easement reads, "An easement for public utility purposes is hereby reserved on, over, under and within the strips and spaces upon this plan defined and bounded by broken lines and marked 'public utility easement' including the right of the utility companies to remove and trim trees on said easement. . . ."
>
> The Thurman easement reads, "The spaces outlined by dashed lines and marked 'electric and telephone easement' are hereby reserved as easements for electric and telephone utility purposes, which include: (1) . . . ."
>
> The Klein easement reads, ". . . five foot easement is retained across the rear of each lot for public utility purposes."

Appellants filed their action in trespass and sought to certify as a class all residents of Louisville and Jefferson County similarly situated. CR 23. On defendants' motion,

the trial court granted summary judgment before addressing the class action issue. In defense of appellants' claim, the appellee CATV companies maintained they were entitled to apportioned use of the easement. They variously interposed the defenses of consent, waiver and estoppel based on language in the service contract each subscriber of cable television was required to sign. At least one appellee contended federal law preempted the field and that utility easements, in the nature of those in question, are subjected to CATV usage. U.S. Const., article VI, clause 2; and 47 U.S.C. 541. While we do not find it necessary to address this contention, it is of significant interest and may require determination were the easements not of the type under consideration.

All appellants have subscribed to cable television at one time or another in the past, and at least one appellant indicated he would continue to subscribe to cable television whatever the outcome of this litigation. The trial court's summary judgment was based upon a finding that appellants had impliedly consented to the installation of the aerial coaxial cable. The trial court found consent from the failure of appellants to contest the dropline which runs from the coaxial cable to their respective residences coupled with the agreement each had signed with the cable companies granting its employees free access to their property to install and service cable equipment. The court also ruled that appellants had not demonstrated that they had been injured. We decline to review the soundness of the trial court's rationale for granting summary judgment, but nevertheless affirm the decision under the rule which compels us to do so when the proper result has been reached. *See Kessee* v. *Smith,* 289 Ky. 609, 159 S. W. 2d 56 (1941). It is our view that the easements in question are susceptible to apportionment to CATV usage. This is true notwithstanding some of the easements identify particular utilities

such as telephone and electricity. They are standard easements found throughout this Commonwealth incident to subdivision development. They are not easements appurtenant (*see Buck Creek R.R. Co.* v. *Haws,* 253 Ky. 203, 69 S. W. 2d 333 [1934]), but are in gross because the benefit of the easement does not inure to any specific real property owned by either appellee utility company. *See Inter-County Rural Elec. Coop. Corp.* v. *Reeves,* 294 Ky. 458, 171 S. W. 2d 978 (1943). As easements in gross, we believe they are particularly susceptible to apportionment and consequently available for the use of utilities in general. The CATV industry is a business of public nature having many of the attributes of public utilities. See *City of Owensboro* v. *Top Vision Cable Company of Kentucky,* Ky., 487 S. W. 2d 283 (1972). We conclude CATV is in fact a public utility within contemplation of the easements in question. A public utility is defined in Black's Law Dictionary (5th Ed.) as follows:

> PUBLIC UTILITY. . . . Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is which is not limited or restricted to any particular class of the community. [Citations omitted.] The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. . . . .

We do not find the CATV industry is deprived of its status simply because utility regulatory agencies of the federal and state governments have, in some way, declined to regulate. 47 U.S.C. 541(c); KRS 278.010(4)(5) and .040. We find it has long been a policy in this state that the type of easement in question is not limited to a particular method of use, but are susceptible to uses of contemporary technology. *See Cumberland Tel. & Tel. Co.* v.

Avritt., 120 Ky. 34, 85 S. W. 204 (1905). We do not discern a valid distinction between the apportionment of an easement to accommodate new technology and apportionment to accommodate a new and different innovation conforming to the definition of a utility and adapted to the ordinary ends of same. Indeed, it seems utility easements in the nature of those at hand have as their purpose the accommodation of all similar utilities. It cannot reasonably be assumed that a subdivision development would dedicate land to utility use with a limitation upon the type of service to be rendered. In this regard, we believe the identification of utilities, such as electric and telephone, was not intended to exclude those utilities requiring compatible installations such as CATV. Generally, we think it is not the function of the utility, but rather the physical nature of its installations which determines whether it conforms to the easement grant. The fact is, the apportioned use of the easements by the CATV companies places no additional burdens upon the appellants as owners of the servient estates. In absence of additional servitude, there can be, of course, no trespass.

Other jurisdictions which have addressed the issue have reached a similar result. *See Salvaty* v. *Falcon Cable Tel.*, __ Cal. App. 3d Supp. __, 212 Cal. Rptr. 31 (Cal. App., Dist. 1985); *White* v. *City of Ann Arbor*, 406 Mich. 554, 281 N. W. 2d 283 (1979); *Staminski* v. *Romeo*, 62 Misc. 2d 1051, 310 N.Y.S. 2d 169 (1979); *Clark* v. *El Paso Cablevision, Inc.*, 475 S. W. 2d 575 (Tex. Civ. App. 1971). Appellants' heavy reliance upon *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) is misplaced. In *Loretto*, the State of New York had passed a statute which dictated that a landlord must permit cable television companies to install cable facilities upon his property. The landlord was to be compensated at a sum fixed by a state commission. The case did not involve an interpretation of easement law. The Court concluded that

the state authorization of the installation of cable equipment in the manner prescribed constituted an unauthorized taking of property within the meaning of the Fifth Amendment. Therefore, the statute was held void.

Finally, upon careful analysis of the myriad facts and details contained in the record before us, we must conclude that the apportioned use of the traditional utility easements at hand lies not only within the direct scope and purpose of the easement, but is well supported by authority as to the manner and use of easements. *See generally*, 25 Am. Jur. 2d *Easements and Licenses*, § 72 et seq. (1966).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

All Concur.

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APPENDIX D

HOUSE OF REPRESENTATIVES
98TH CONGRESS, 2d SESSION
REPORT 98-934

CABLE FRANCHISE POLICY AND COMMUNICATIONS ACT OF 1984

REPORT

OF THE

COMMITTEE ON ENERGY AND COMMERCE

together with

ADDITIONAL AND SEPARATE VIEWS ON H.R. 4103

(Including cost estimate of the Congressional Budget Office)

* * * * * * *

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The Committee notes the Supreme Court's decision in the case of *Loretto* v. *Teleprompter,* 458 U. S. 419 (1982), striking down a New York state statute affording cable operators access to premises on the grounds that there was no provision in this statute for granting affected property owners just compensation for the use of their property. In

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order to comply with the constitutional requirements set forth by the court in that decision, this section requires that Commission regulations, and any regulations promulgated by a state of franchising authority, assure that the owner of any affected premises does receive just compensation.

Subsection (b) requires that prescribed regulations provide: (A) that the safety, functioning, and appearances of

the premises and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system; (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; (C) that the owner be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator; and (D) methods for determining the calculation of just compensation.

In developing a methodology for determining what constitutes just compensation, among the factors that are to be considered, are the following, as set forth in subsection (d): the extent to which the cable system facilities physically occupy the premises; the actual long-term damage which the cable system facilities may cause to the premises; the extent to which the cable system facilities would interfere with the normal use and enjoyment of the premises; and, the enhancement in value of the premises resulting from the availability of cable service.

* * * * *